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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

NATIONAL FOUNDATION FOR CANCER RESEARCH, INC.,
Petitioner,

v.

COUNCIL OF BETTER BUSINESS BUREAUS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether the court below erred in applying First Amendment principles in holding that petitioner, a charitable foundation, was a public figure in a defamation action, where the basis for the holding was petitioner's efforts to seek financial support from the public, and not the existence of any particular public controversy.

2. Whether the court of appeals erred in holding that the petitioner had created a particular public controversy about its activities by virtue of (i) its direct-mail fundraising program; (ii) its statement in a solicitation letter that it makes productive use of donated funds; (iii) its stated desire to increase its recognition and support; and (iv) the fact that its solicitation materials have prompted an unspecified number of inquiries from individual members of the public.

LIST OF ALL PARTIES

The caption of the case contains the names of all parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported, and appears herein at Appendix A (pp. 1a-7a). The rulings from the bench and the order of the United States District Court for the Eastern District of Virginia are not reported, and appear at Appendices B (pp. 8a-27a) and C (p. 28a), respectively.

JURISDICTION

The judgment of the court of appeals sought to be reviewed was entered on April 5, 1982, affirming the judgment of the district court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

This case involves the First Amendment to the United States Constitution, which is set out verbatim:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. CONST. amend. I.

STATEMENT OF THE CASE

Petitioner, National Foundation for Cancer Research, Inc. ("NFCR" or "the Foundation"), is a not-for-profit charitable organization founded in 1974 in order to fund research into the causes of cancer, with the goal of eventually preventing, curing or controlling this disease. Specifically, NFCR was created to explore the scientific theories of Dr. Albert Szent-Gyorgyi, a Nobel Prize winner whose bioelectronic theory of cancer focuses on the role that submolecular phenomena play in the

random growth of cancer cells. Dr. Szent-Gyorgyi and some seventy other scientists conduct research at approximately sixty NFCR laboratories around the world. The Foundation spends several million dollars a year on cancer research.

NFCR relies primarily on direct-mail appeals to raise money to conduct its research. NFCR mails solicitation letters to potential donors and relies on relatively small contributions from large numbers of donors as its primary source of funding. NFCR has mailed some 68 million solicitation letters to individuals over the last three years. NFCR occasionally receives larger donations, usually through bequests in wills, but a typical donation falls in the five-to-ten dollar range. Contributions to NFCR over the last three years total some $25 million.

Although the precise content of NFCR's solicitation letters varies, by far the most prevalent theme of the letters is the importance of NFCR's research and the need to continue funding of NFCR's scientists. In some solicitations, NFCR has stated that it will make the most productive use of every donated dollar, or words to that effect, to convey the message that the Foundation makes judicious use of the contributions it receives.

The Council of Better Business Bureaus, Inc. ("CBBB") is a national membership organization composed principally of several hundred business organizations and approximately 150 local better business bureaus located throughout the United States. Most of CBBB's activities relate to the business ethics of for-profit enterprises, including monitoring and reporting on business practices and resolving disputes between businesses and their customers. However, CBBB also has a division, the Philanthropic Advisory Service ("PAS"), that establishes standards for not-for-profit charitable organizations. The PAS evaluates charitable organizations for compliance or noncompliance with its Standards for Charitable Solicitations, issues lists of complying and noncomplying organizations, and issues more detailed reports on selected organizations.

The PAS states that its decision on whether to issue a more detailed report on an organization is governed by the degree of

interest the public has shown in that organization. The PAS does not actually count the number of inquiries that it or the local better business bureaus have received, but relies instead on its general estimation of the degree of the public's interest. There is no evidence that the nature of the inquiries about an organization figures in the PAS's decision to issue a full report, nor are the reports limited to the issues about which persons may have inquired. Once the director or assistant director of the PAS elects to publish a full report, a report is then prepared, covering all phases of the organization's activities as they relate to the Standards for Charitable Solicitations.

The PAS published a full report on NFCR in August of 1981. The report found that NFCR was not in compliance with the Standards for Charitable Solicitations.

NFCR instituted an action for defamation against CBBB on August 5, 1981, in the United States District Court for the Eastern District of Virginia. (The complaint contained additional counts that are not here relevant.) After discovery, CBBB moved for summary judgment on February 18, 1982. CBBB argued that NFCR was a "public figure" for purposes of its defamation claims and, as such, would be required to prove that the PAS published its defamatory statements with knowledge of their falsity or with reckless disregard for whether they were true or false, *i.e.*, with "actual malice."

The court heard oral argument on CBBB's motion for summary judgment on March 19, 1982. In a two-page order incorporating the reasons he had stated from the bench, Judge Albert V. Bryan, Jr. granted partial summary judgment to CBBB and held that NFCR was a public figure for purposes of its defamation claims. Following are the relevant portions of the court's ruling:

> Insofar as the defamation claim is concerned, I have no problem determining that this plaintiff is a public figure. In the words of Gertz, it has assumed a role of special importance in this affair of society, namely, cancer research. And while it is not a public figure for all purposes, it has, it seems to me, thrust itself in the forefront of a

particular public controversy in order to influence the resolution of issues involved.

I don't take controversy as always meaning dispute or quarrel. I think it can be a cause. Certainly, the cause of cancer research and the funding that is involved in pursuing that research is a public cause. Controversy, if you will, if you go further and talk about the methods of research that this particular organization pursued.

I don't think you have to get that far. They are—they have by massive mailings, by media attention, it seems to me, created with their research and their funding themselves as public figures. They undertake to influence the consuming public. It certainly has received, both research and funding by them, has received public attention.

It's more than just newsworthy. They have thrust themselves into the forefront of a matter that has public interest. So I will rule on the defamation count that the plaintiff is a public figure.

(App. B, *infra,* at 25a-26a.)

NFCR filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit on March 29, 1982. All briefs were submitted to the court before September 2, 1982. A three-judge panel of the court heard the parties' oral argument on December 8, 1982.

The court of appeals, in an opinion written by Judge James H. Michael, Jr. (United States District Judge for the Western District of Virginia, sitting by designation), affirmed the holding of the district court that NFCR was a public figure in its action for defamation against CBBB (App. A, *infra,* at 6a-7a). The appellate court reasoned that NFCR had put itself in the public eye through the quantity of its solicitation letters, through statements in those solicitation letters concerning the Foundation's judicious use of funds, and through two statements made by NFCR's Executive Director, Franklin C. Salisbury. The first statement was made during Mr. Salisbury's deposition in the case and described the public relations work of NFCR as an effort to "make the National Foundation for

Cancer Research a household word." The second statement was quoted in the September 26, 1979, edition of the *Cape Cod Times* in connection with Dr. Szent-Gyorgyi's research theories. Regarding the merits of NFCR's research, Mr. Salisbury stated, "I have to present the case to the jury of the American people."

The court of appeals rejected NFCR's arguments that the August 1981 report did not concern a particular public controversy and that NFCR had not injected itself into any particular public controversy. The panel held that, apart from whether any particular public controversy could be identified, NFCR "attempted, through various means at its disposal, to put itself and its methods before the public. With respect to these issues, it became a public figure under *Gertz.*" (App. A, *infra,* at 7a.) The court further held that "[o]n the basis of the NFCR's conduct, the district court had ample cause to rule the appellant a public figure for purposes of the defamation action." *(Id.* at 6a.) Except when characterizing NFCR's arguments, the court of appeals never once used the words "particular public controversy" in its opinion. NFCR seeks this Court's review of the holding that a defamation plaintiff may be classified as a public figure in the absence of a particular public controversy.

Despite its clear holding that no particular public controversy need be identified, one seemingly gratuitous sentence of the opinion suggests that the court of appeals may have attempted to portray NFCR *itself* as a public controversy, to wit:

> Even though the "public controversy" which formed the basis of this lawsuit arose almost entirely from the Foundation's solicitation and use of funds for its cancer research, the mere fact that NFCR generated the controversy does not preclude a finding that there was, in fact, a controversy.

(App. A, *infra,* at pp. 6a-7a.) The import of this statement by the court is unclear. If the court of appeals meant to hold that NFCR's solicitation letters created a particular public controversy about the Foundation, the holding was supported only by the fact that NFCR had raised $25 million in three years

and on CBBB's representation, which NFCR disputed, that the public had made numerous inquiries about NFCR. Therefore, NFCR also seeks review of the court of appeals' possible alternative holding that soliciting funds, which inevitably arouses some curiosity and prompts some inquiries, is sufficient to create a particular public controversy.

This petition thus seeks review of both aspects of the court of appeals' ruling. NFCR maintains that identifying a particular public controversy was an indispensable prerequisite to finding NFCR to be a public figure, and that voluntarily seeking the public's attention does not render one a public figure in the absence of a particular public controversy. NFCR also maintains that soliciting funds through self-promotion, without more, does not give rise to a public controversy. However read, the court of appeals' opinion constitutes a clearly erroneous application of the relevant constitutional principles.

REASONS FOR GRANTING THE WRIT

1. The court of appeals has fundamentally misread this Court's controlling decisions concerning the criteria for determining the constitutional standard of proof imposed by the public-figure doctrine upon plaintiffs who sue for defamation. By disregarding the requirement that a particular public controversy be identified before the plaintiff can be held to be a public figure, the opinion of the court of appeals jeopardizes the reputational interests of a broad class of plaintiffs, with no offsetting benefit to society's interest in free and open debate on matters of public importance.

The court of appeals reads this Court's decision in the seminal case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as holding that "the key to determining whether a party is a public figure is the party's own conduct." (App. A, *infra*, at 6a.) This interpretation of *Gertz* ignores the need to determine, as the first step in the inquiry, whether the publication at issue concerns any particular public controversy. The

crux of the court's opinion is that NFCR's voluntary efforts to increase its support were *alone sufficient* to subject NFCR to the actual-malice standard of proof. Thus, for all practical purposes, the appellate court held that NFCR had forever waived its right to private-plaintiff status, whether or not the Foundation was in the forefront of any particular public controversy.

This is an erroneous reading of this Court's opinion in *Gertz*, of the cases preceding *Gertz*, and of the cases that have followed. *Gertz* held that a plaintiff's attention-seeking activities are sometimes relevant to its status as a public or private figure in a defamation case, but *Gertz* did not hold that such activities are alone dispositive. In all cases, publicity-seeking activities are only relevant if they serve to place the plaintiff in a position of special prominence concerning some specific public controversy.[1]

The constitutional underpinning of the actual-malice test is not a policy of punishing those who choose to lead any manner of public life. Rather, it is society's interest in protecting "speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 341. This fundamental proposition must be the starting point: although the freedoms of speech and press require "breathing space," *id.* at 342, it has never been held that all speech requires the stringent constitutional protection of the actual-malice test to safeguard society's interest in the free flow of ideas. The *Gertz* requirement that a court first identify a particular public controversy recognizes this fundamental proposition, just as it recognizes that "[t]he need to avoid self-censorship by the news media is, however, not the only societal value at issue." *Id.*

Since the actual-malice test only serves to protect speech that requires special protection, the first area of examination must always be the challenged publication. When the publication concerns no particular public controversy, the inquiry is over. The First Amendment interest must yield some ground to

[1] There is no suggestion that NFCR is among the class of plaintiffs that "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

the interest in reputation. The Constitution then permits state law to provide that the plaintiff will prevail if the publisher was negligent.

Any other reading of *Gertz* ignores the underlying reasons for the drastic impairment of a plaintiff's reputational interest that is wrought by the actual-malice standard. Only if the publication concerns a particular public controversy, where "breathing space" is necessary to assure a full airing of the issues, is it appropriate to tax so heavily the reputational interest of a plaintiff. The Constitution does not require one to forego his interest in his reputation absent the public's special need to protect the challenged publication.

Certainly none of the opinions of this Court prior to *Gertz* is premised on the notion that defamation plaintiffs must essentially abandon their reputational interests without regard to the public's concern about the subject matter of the challenged publication. As the Court stated in *New York Times v. Sullivan,* " The general proposition that freedom of expression *upon public questions* is secured by the First Amendment has long been settled by our decisions." 376 U.S. 254, 269 (1964) (emphasis added). Because a public official's fitness for office is the quintessence of a public question, the Court fashioned "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves . . . 'actual malice'. . . . " *Id.* at 279-80. The Court's entire premise in *New York Times* was the need to protect certain special types of expression.[2] For this reason, defamatory utterances unrelated to the official conduct of a public official are not protected by the actual-malice standard, there being no overriding societal need for the protection.

Two years after *New York Times v. Sullivan,* the Court extended the actual-malice standard to public figures who are "involved in *issues in which the public has a justified and*

[2] Although the Court noted that its newly articulated federal rule was "appropriately analogous" to the immunity enjoyed by a public official for utterances made within the scope of his duties, New York Times v. Sullivan, 376 U.S. 254, 282 (1964), this was clearly only a supporting consideration in the Court's decision.

important public interest." Curtis Publishing Co. v. Butts, 388 U.S. 130, 134 (1967) (emphasis added). Once again, the only constitutional basis for the Court's holding was the importance of uninhibited speech and press on public issues, which the Court "recognized as parallel to the interest in publishing political criticism present in the *New York Times*. . . ." *Id.* at 160 In holding that a person who is not a public official may become a public figure by "purposeful activity amounting to a thrusting of his personality into the 'vortex' *of an important public controversy," id.* at 155 (emphasis added), the Court reaffirmed the need to examine society's interest in the publication as the first inquiry. The Court certainly adopted no "waiver" or "assumption of the risk" theory as a wholly independent ground for distinguishing public and private figures.

Indeed, a sharply divided Court held that the plaintiff's activities were completely irrelevant in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971). Society's need for full debate on issues of public or general interest was held to overcome the reputational interests of plaintiffs, whether or not they had sought publicity or attempted to remain anonymous:

> We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

Id. at 43-44 (footnote omitted). By focusing exclusively on the public's need to know, *Rosenbloom* greatly expanded the roster of potential public figures.

Gertz limited *Rosenbloom* in two important respects. First, *Gertz* held that a state's interest in the reputation of its citizens, even where the plaintiff was involved in a public controversy, required a determination of whether the plaintiff had attempted to become famous or remain anonymous. Thus, "instances of truly involuntary public figures must be exceedingly rare." *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 345.

But it is the second limitation placed upon *Rosenbloom* that is critical to the issues presented here: the *Gertz* Court rejected the "general or public interest" test as the measure of whether particular expression deserved the protection of the actual-malice test and replaced it with the requirement that there be a *particular public controversy.* The Court did so in order to avoid the "difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not. . . ." *Id.* at 346. Thus, according to *Gertz,* the actual-malice standard would extend only to comment on actual public controversies, not to comment on any matter deemed by a particular court to be of general or public interest. Courts are not to look to their own subjective views to determine when a publication requires the protection of the actual-malice test, but rather to the actual debates occurring in the public domain, thereby allowing the public itself to define the matters on which it seeks full and unfettered discussion. [3]

It is equally certain what *Gertz* did *not* hold. *Gertz* did not hold that the subject matter of the defamatory publication would be thereafter irrelevant. *Gertz* did not hold that attention-seeking activities would thereafter constitute the sole criterion for identifying public figures, without regard to the existence of a public controversy. *Gertz* did not establish a more expansive test than that set forth in *Rosenbloom.* To read *Gertz* as the court of appeals has read it—as establishing a new, more expansive test—is to ignore not only the language of the opinion, but also its constitutional foundation.

Since *Gertz,* the Court has consistently emphasized the need to identify a particular public controversy in determining the status of a defamation plaintiff. In *Time, Inc. v. Firestone,* 424 U.S. 448 (1976), the Court discussed at length whether the divorce proceeding of a Florida socialite was a public controversy within the meaning of *Gertz,* and held that it was not.

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[3] As stated by the Court of Appeals for the District of Columbia Circuit, "[t]o determine whether a controversy indeed existed and, if so, to define its contours, the judge must examine whether persons actually were discussing some specific question." Waldbaum v. Fairchild Publications, Inc., 201 U.S. App. D.C. 301, 311, 627 F.2d 1287, 1297, *cert. denied,* 449 U.S. 898 (1980).

The Court relegated the discussion of the plaintiff's voluntary activities to a footnote, *id.* at 454-55, and even this discussion was in the context of whether plaintiff's press conferences had served to thrust her to the forefront of some controversy other than her divorce proceeding.

In *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979), the plaintiff's conduct was so clearly private that it was unnecessary for the Court to "determine with precision the 'public controversy' into which the petitioner is alleged to have thrust himself." *Id.* at 166 n.8. Nonetheless, the Court quite pointedly expressed its doubts as to whether the defamatory publication concerned any public controversy, leaving it clear that the existence of a controversy was a prerequisite to finding that a plaintiff is a public figure. *Id.*

Finally, in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), the Court again emphasized the absence of any particular public controversy, finding a "concern about general public expenditures" to be insufficient. *Id.* at 135. The plaintiff's lack of prominence bolstered the conclusion that the plaintiff was a private figure, but the starting point and foundation of the Court's analysis was whether any public controversy had surrounded the plaintiff's activities in the first place.

When the Court defined a public figure in *Gertz* as one who had thrust himself to the forefront of a particular public controversy, the Court was not simply offering an optional mode of analysis to be employed or ignored in balancing the interests represented by the First Amendment and those represented by the law of defamation. Nor was the Court discarding the constitutional rationale that originally supported the imposition of an extreme standard of proof on certain plaintiffs suing for defamation. Far from it, the Court was reaffirming—as it has in three cases since *Gertz*—the principle that the First Amendment serves society's need for full and robust debate on

matters of public controversy. Absent this purpose, the actual-malice standard need not be imposed upon a plaintiff as the price of a nonreclusive life.[4]

Since NFCR has not thrust itself into any particular public controversy, its claims cannot be subject to the actual-malice standard, regardless of the fact that it has sought financial support from the public. The Court should grant the writ to restore the balance between the competing interests at stake in defamation cases, and to dispel the idea that the Constitution requires the sacrifice of a party's reputational interests without a showing of any societal need.

2. The court of appeals' holding that NFCR's direct-mail solicitation program created a public controversy about the Foundation's research program and its use of donated funds substitutes overbroad generalizations for careful analysis of the record. Unless reviewed by this Court, the Fourth Circuit's opinion will stand as authority for the proposition that virtually any self-promotion or advertising that succeeds in generating any public response will satisfy the requirements for identification of a public controversy.

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[4] Other appellate courts that have had occasion to apply *Gertz* have clearly understood the need to make a threshold identification of the public controversy at issue. *See, e.g.*, Waldbaum v. Fairchild Publications, Inc., 201 U.S. App. D.C. 301, 310, 627 F.2d 1287, 1296, *cert. denied*, 449 U.S. 898 (1980) ("As the first step in its inquiry, the Court must isolate the public controversy."); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 590 (1st Cir. 1980) (the court's first task is to determine whether there was the sort of public controversy referred to in *Gertz*).

The United States Court of Appeals for the Fifth Circuit has held that "Gertz did not define all subcategories of the public figure classification" and has suggested that merely entering a certain profession, one not necessarily entailing any public controversy, would invite press attention so as to render the plaintiff a public figure. Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1254 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981). The court of appeals in this case has taken the same approach, implying that mass mailing inherently invites attention, if not controversy, thus rendering any plaintiff engaged in this activity a public figure. To the extent that the court in this case and the Brewer court ignore the plain language of *Gertz*, which requires that the plaintiff be in the forefront of a particular public controversy, they are squarely at odds with controlling constitutional jurisprudence.

Although it held that NFCR was a public figure simply "[o]n the basis of the NFCR's conduct," (App. A, *infra*, at 6a) without regard for whether any public controversy surrounded NFCR, the court below nevertheless seemed to suggest that NFCR had generated a public controversy about itself. This holding was based primarily on the fact that NFCR had sent out large quantities of mail as part of its routine direct-mail fundraising program, resulting in contributions totalling $25 million over the last three years. Although direct-mail solicitation and advertising are pervasive in both the not-for-profit and the commercial worlds, NFCR's use of direct-mail solicitation as a fundraising technique prompted the court to declare NFCR a public figure.

The Fourth Circuit apparently found it noteworthy that some of NFCR's solicitation appeals extolled the Foundation's judicious use of donated funds. In addition, the court seized upon two statements made by Franklin Salisbury, NFCR's Executive Director, evidencing Mr. Salisbury's hope of increasing NFCR's recognition and support. Finally, the court credited CBBB's representation that it had received numerous inquiries about NFCR, although it made no finding concerning the number or the nature of those inquiries.

The factors relied upon by the court of appeals fail to distinguish NFCR from innumerable other organizations that conduct direct-mail solicitations or comparable mass-audience advertising. None of these factors supports the conclusion that NFCR attempted to create—much less succeeded in creating—a public controversy about itself.

We start with the fact that NFCR conducts direct-mail fundraising. NFCR's fundraising activities are, of course, the lifeblood of its research activities. There is no question that NFCR seeks public attention, in the form of increased support, through its mailings. The question is whether the solicitation letters serve to create a true public controversy about NFCR's research or its use of funds.

NFCR's contacts with the public generate interest in the Foundation and, no doubt, arouse some curiosity about

NFCR's charitable program. Indeed, NFCR intends to capture each reader's attention so that its appeal for a contribution will be considered seriously. But to conclude that NFCR's solicitation letters alone create a particular public controversy is to conclude that all self-promotion inherently raises issues of public moment, if only because individual recipients of a solicitation letter may question whether the soliciting organization is more or less worthy of support than competing organizations. It is then but a small step to conclude that every commercial advertisement spawns a public debate about the merits of the advertised product or service. If so—if appeals for support can alone create particular public controversies—then most charitable organizations and most businesses are, *a fortiori,* public figures for some purposes. Simply posing the proposition is to refute it. *Gertz* simply does not sweep so broadly.

Since public contacts alone are no basis for assuming the existence of a public controversy, one must examine the nature of those contacts. NFCR's overriding theme in its solicitation letters is the importance of the work of NFCR's scientists, the promise that their work holds in the quest to discover the causes of cancer, and the need for additional funding to continue the work. This is hardly remarkable. The importance of the charitable cause is a typical theme in most requests for charitable donations.

Although the importance of controlling cancer has been the dominant theme of NFCR's appeals, NFCR has also said that it makes judicious use of funds in some of its solicitation letters. This, too, is entirely predictable in a charitable solicitation. These sorts of representations, made in a request for a charitable contribution, no more inspire controversy than a salesman's representations about the quality of his product. Such representations are intended to generate favorable attention, to invite a favorable comparison with other charitable causes (or products), and to persuade the listener or reader to take a certain action. Whether or not they succeed, these representations generally do not touch off public debates or foster public controversy. There is nothing surprising, much

less controversial, about NFCR's representations that it will use donated funds as wisely as possible in its effort to understand and control cancer.

As to Mr. Salisbury's desire to have NFCR become a "household word," even if read with the great weight endowed by CBBB and the court of appeals, it is sufficient answer that the statement says nothing about a desire to become the center of a controversy. Public recognition and public controversy are different notions, in common parlance and in constitutional law. Certainly many "household words" are wholly uncontroversial. Nor does Mr. Salisbury's figurative statement that he would present NFCR's research "to the jury of the American people" compel the conclusion that the organization intended to stir, much less *has* stirred, a public controversy about its use of funds. The court of appeals' reliance on these extraneous statements cannot substitute for an empirical determination of whether NFCR really became the subject of public debate in any sense that would distinguish the Foundation from the multitude of other organizations engaged in similar activities.

It is clear that the court of appeals was more concerned with what it deemed to be NFCR's efforts to seek public attention than with determining whether a controversy existed, which is the ultimate issue. The only record evidence as to whether any controversy existed was CBBB's contention that it had received "numerous inquiries" about NFCR, but the court of appeals considered neither the number of the inquiries, their nature (*i.e.*, whether they concerned specific practices of NFCR or were simply of a general nature), nor whether they were primarily the result of CBBB's own reports on NFCR. The court below merely relied on CBBB's self-serving contention that the inquiries had been "numerous."

The court of appeals' analysis proves too much. When a defamation plaintiff falls within the large category of organizations that depend upon public support, be it in a charitable or commercial setting, the defendant will virtually always be able to characterize the plaintiff as having taken a stand on some "issue." And if the organization meets with any success whatever, it will by definition have provoked some public response.

But this response no more evidences a public controversy than the initial request for support indicates a desire to achieve special prominence in the debates of society. The public-figure doctrine is too important to be applied in such an indiscriminant fashion. The Court should review the court of appeals' holding to remove the legal straitjacket that it places upon so many organizations regardless of whether they are engaged in any meaningful public controversy.

3. The lower federal courts, as well as the state courts, are in substantial conflict regarding the factors to be applied in analyzing the effects of promotional activities on a defamation plaintiff's status as a public or private figure. The Court should grant the writ to provide needed guidance in an area affecting the reputational interests of large segments of society.

NFCR does not maintain that the solicitation of charitable contributions or commercial advertising efforts can never render one a public figure. NFCR does urge that certain differentiating factors must be present before otherwise accepted and widespread activity requires one to pay the price extracted by the actual-malice standard. To date, however, judicial attempts to articulate when such activity creates a particular public controversy have resulted in essentially irreconcilable decisions, leaving considerable confusion as to the relevant factors in analyzing these important constitutional issues.

The court of appeals in this case relied exclusively on the opinion of the Court of Appeals for the Third Circuit in *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264 (3d Cir. 1980), in suggesting that NFCR had generated a controversy about itself through its solicitation letters. Characterizing the promotional efforts of the plaintiff in marketing its low-priced meat as an "advertising blitz," the court in *Steaks Unlimited* resolved "the difficult constitutional question" by holding that the plaintiff "voluntarily injected itself into a matter of public interest—indeed it appears to have created a controversy—for the purpose of influencing the consuming public." *Id.* at 266, 274. To the extent that the court of appeals in this case implicitly

recognized any need to identify a public controversy, it essentially relied on a broad reading of *Steaks Unlimited* for the proposition that advertising or promoting oneself inevitably creates such a controversy.

Although NFCR submits that the court below has interpreted *Steaks Unlimited* too broadly, that case indeed raises issues similar to those raised by the instant petition. However, the opinion in *Steaks Unlimited* leaves important questions unanswered. First, is advertising a product always sufficient by itself to render the plaintiff a public figure for purposes of comment on the quality of the product, or must the advertising be of a special character, either in its intensity or in its message, before it may be held to create a public controversy? The court in *Steaks Unlimited* stressed the intensity of the plaintiff's promotional efforts, but left unclear how or why this factor should be used to distinguish among defamation plaintiffs, or how "intensity" is to be measured and compared. The court also emphasized that numerous complaints had been registered by the public concerning the quality of the plaintiff's meat—a point which the plaintiff did not dispute [5]—presumably as empirical evidence that public concern actually did flow from the plaintiff's advertising. *Id.* But how many inquiries or complaints are sufficient to support a finding of public controversy, given that any mass appeal will invariably generate some inquiries?

The factors relied upon in *Steaks Unlimited*—advertising that generates interest on the part of certain members of the public—can probably be found in almost any case where the plaintiff challenges defamatory statements critical of its product

[5] Steaks Unlimited v. Deaner, 623 F.2d 264, 274 n.2 (3d Cir. 1980). It was also clear that the complaints cited by the court concerned precisely the same subject as the allegedly defamatory article: the quality of the plaintiff's product. In the instant case, NFCR disputes both that the inquiries received by CBBB were numerous, and that they involved the matters which were the subject of CBBB's defamatory report.

or business conduct. The court of appeals in this case did not analyze the facts to explain how NFCR's solicitation efforts, and their effect on the public, differ from those of a great many other organizations. The lower court's unexplained reliance on *Steaks Unlimited* suggests that advertising or promotion that spawns *any* public response satisfies the requirement that the plaintiff thrust himself into a particular public controversy. This is a sweeping view that other courts have rejected.

In a factually similar case decided only a few months after *Steaks Unlimited,* the Court of Appeals for the First Circuit flatly rejected this broad reading of the public-figure doctrine. In *Bruno & Stillman, Inc. v. Globe Newspaper Co.,* 633 F.2d 583 (1st Cir. 1980), the plaintiff sold commercial fishing boats with considerable success. According to the plaintiff's own complaint, sales had increased over the years "[b]y dint of 'enormous work and effort . . . in manufacturing, promoting and selling boats.' " *Id.* at 584. The district court dismissed the plaintiff's negligence count, holding that its promotional efforts and sales rendered the plaintiff a public figure for purposes of a defamation action challenging statements critical of the quality of the boats. In a sharp reversal, the First Circuit criticized the following statement from the district court opinion:

> [B]y engaging in the business of selling products, corporations voluntarily place before the public an issue of some importance regarding the quality and integrity of their products. In addition, corporations generally promote the sale of their products to the public by engaging in some form of advertising. Thus, at least to the extent that allegedly defamatory publications relate to the quality of the products which a corporation markets, I rule that corporations should be treated as public figures.

Id. at 585. The First Circuit rejected the broad expansion of the public-figure doctrine found in the district court's ruling—and followed uncritically by the court of appeals in this case—and refused to declare "all reasonably successful manufacturers and merchants (and professionals) to be, without more, 'public figures' in their community." *Id.* at 592. As the court stated, "[a]t this point the law of defamation would largely be obliterated." *Id.*

Despite some efforts by the court in *Bruno & Stillman* to distinguish *Steaks Unlimited,* the two cases are essentially irreconcilable. The *Bruno & Stillman* court stated that it had insufficient information concerning the plaintiff's advertising campaign, as contrasted with the "advertising blitz" emphasized in *Steaks Unlimited,* but noted that the plaintiff had conceded that its promotional success was the result of "enormous work and effort." *Id.* at 584. There is no meaningful distinction here. The court also questioned whether any controversy had preceded the alleged defamation, but observed that a "number of owners of company-built boats had had unhappy—or worse—experiences . . ." *Id.* at 591. This factor also seems indistinguishable from the "numerous complaints" found in *Steaks Unlimited.* Finally, the court questioned "the extent to which the threshold of reputation protection depends upon the nature of the industry," *id.* at 592, but did not say whether comments on the safety of commercial fishing boats deserved greater or less protection than comments on the quality of low-priced meat. Despite the court's obvious hesitancy to reject *Steaks Unlimited* outright, the cases are not factually distinguishable in any way that makes sense of this Court's pronouncements.

Steaks Unlimited and *Bruno & Stillman* are perhaps the most striking examples of the need to reconcile the conflicting approaches to application of the public-figure doctrine in the area of solicitation and advertising. But other federal and state decisions also illuminate the need for guidance by this Court. In *General Products Co. v. Meredith Corp.,* 526 F. Supp. 546 (E.D. Va. 1981), the district court concluded that a seller of chimneys had not engaged in an advertising blitz and was not a public figure for purposes of an article critical of its product. But the opposite result obtained in *Bose Corp. v. Consumers Union of United States, Inc.,* 508 F. Supp. 1249 (D. Mass. 1981), *rev'd on other grounds,* 692 F.2d 189 (1st Cir. 1982). There, the district court held that the manufacturer of loudspeakers that were a "radical departure" from conventional designs was a public figure because its advertising "added its voice to the chorus that was already discussing the merits of various loudspeaker systems." *Id.* at 1272-73.

The United States District Court for the Eastern District of Pennsylvania cited this Court's holding in *Time, Inc. v. Firestone,* that a public controversy was not to be equated with all controversies of interest to the public, and rejected the argument that "plaintiff, in connection with his charitable fundraising activities, naturally became the subject of press attention." *Hanish v. Westinghouse Broadcasting Co.,* 487 F. Supp. 397, 403 (E.D. Pa. 1980). And in *Havalunch, Inc. v. Mazza,* 294 S.E.2d 70 (W. Va. 1981), the highest court in West Virginia cited a number of cases that attempted to distinguish among restaurants that were and restaurants that were not public figures. Finally, in *Vegod Corp. v. American Broadcasting Cos.,* 25 Cal. 3d 763, 770, 603 P.2d 14, 18, 160 Cal. Rptr. 97, 101 (1979), *cert. denied,* 449 U.S. 886 (1980), the California Supreme Court held that "a person in the business world advertising his wares does not necessarily become part of an existing public controversy."

Thus, a number of courts have held that advertising or self-promotion, without more, does not serve to thrust the plaintiff into a public controversy. Courts that have found that the marketing of a product renders one a public figure have not articulated their reasoning in a manner that aids application of their holdings to new factual settings. The result is great uncertainty.

From its opinion in *New York Times v. Sullivan* through its most recent pronouncement in *Hutchinson v. Proxmire,* the Court has only had occasion to explain the public-figure doctrine as it applies to individuals. None of the Court's opinions has addressed how the doctrine should be applied to the multitude of organizations, including a large segment of the commercial world, whose daily activities entail contacting large numbers of people for essentially economic purposes. Application of the public-figure doctrine in this area raises questions about the meaning of "public controversy" and about the extent to which attempts to persuade others to make spending decisions subjects an organization to the actual-malice standard in a defamation case. The lower courts are in substantial disagreement on these issues. The Court should grant the instant petition and issue the writ to illuminate the proper application of constitutional principles in this area.

CONCLUSION

If the *Gertz* doctrine is to retain its vitality as part of the constitutional jurisprudence in the Fourth Circuit and if defamation plaintiffs are not to labor under burdens never intended by the Court, this case must be reviewed.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Of Counsel

July 1, 1983

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1382

NATIONAL FOUNDATION FOR CANCER RESEARCH, INC.,
Appellant,

v.

COUNCIL OF BETTER BUSINESS BUREAUS, INC.,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, Alexandria Division. Albert V. Bryan, Jr., District Judge.

Argued: December 8, 1982 Decided: April 5, 1983

Before SPROUSE and ERVIN, Circuit Judges, and MICHAEL,* District Judge

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Mac S. Dunaway (Kenneth G. Hurwitz, Gary E. Cross, Dunaway, McCarthy & Dye, P.C. on brief) for Appellant; Anna C. Thode (Walter J. Smith, David Florin, Wilson, Elser, Edelman & Dicker on brief) for Appellee.

*Hon. James H. Michael, Jr., United States District Judge for the Western District of Virginia, sitting by designation.

Michael, District Judge:

This case is before the court on appeal from the United States District Court for the Eastern District of Virginia. The National Foundation for Cancer Research, Inc., [hereinafter "Foundation" or "NFCR"], the plaintiff/appellant, has appealed the order of the district court which granted summary judgment in favor of the Council of Better Business Bureaus, Inc. [hereinafter "Council" or "CBBB"], the defendant/appellee. Although the summary judgment order did not dispose of the entire case, the district court, pursuant to a stipulation of dismissal, dismissed without prejudice that portion of the action which remained for trial.

The NFCR sought both monetary and injunctive relief, alleging it had been wrongfully injured by an August 1981 report wherein the CBBB purported to "evaluate" the NFCR as a charitable institution. In the report, it was noted that the NFCR did not meet the Council's standards which call for spending a reasonable percentage of a charity's total income on program services. In addition, the CBBB indicated it regarded certain statements contained in the NFCR's 1980 fund raising appeals as inaccurate and misleading. As a result of this evaluation, the Foundation claims it was defamed by the CBBB. Furthermore, the NFCR asserts that the Council has a substantial effect upon the economic viability of charitable organizations by its promulgation of certain standards and its reporting of compliance, or lack of compliance, with these standards to potential donors. As a consequence of this influence, the CBBB, it is alleged, owes a duty to the charities it evaluates to apply its standards fairly and reasonably. The NFCR claims this duty was breached and that the Council is liable in a civil action for the resulting damage.

Ruling on the Council's motion for summary judgment, the district court found against the NFCR on three crucial legal issues, all of which are before this court today. With respect to the NFCR's suit for defamation, the court ruled, first, that the Council's statement that the NFCR did not spend a reasonable percentage of its total income on program services was a statement of opinion and, accordingly, not actionable. The

second ruling was that, under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the NFCR was a public figure for the purposes of the remainder of the defamation action. Third, the court found that neither the NFCR nor any other charity was entitled to judicial review of the CBBB's evaluation to determine whether substantive or procedural due process was afforded the evaluated charity. This court affirms the decision of the district court on all three matters.

I. A Common Law "Duty of Fairness" Is Not Applicable

The appellant urges this court to adopt the position that the CBBB's imprimatur of approval is so crucial to a charitable organization's institutional viability by virtue of the effect it has on potential donors that, under the common law applicable to private associations, the CBBB has a duty to apply its standards fairly and reasonably to those charities it evaluates. Of course, concomitant with that "duty" is an action for breach, which the appellant would have this court recognize. The court finds it curious that neither party specifically addressed itself to the common law of Virginia, for this court, hearing this matter under its diversity jurisdiction, is obliged, under the principles of *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), to construe and apply the substantive law of Virginia in this action. In such a posture, a federal court must "determine the rule that the [state] Supreme Court would probably follow, not fashion a rule which we, as an independent federal court, might consider best." *Kline* v. *Wheels by Kenney*, 464 F.2d 184, 187 (4th Cir. 1972). The appellant has cited numerous cases to support his assertion that a private organization's actions can be subjected to judicial review where the power exercised by that entity can significantly affect the economic or professional concerns of other parties. This court finds, however, as did the district court below, that these cases recognize a cause of action for breach of the duty of fairness only where a private association can, by excluding an entity from membership or by refusing to recognize or certify an entity, deny a virtual pre-requisite to the practice of a profession or the operation of a business. *See McCreery Angus Farms* v. *American Angus Association*, 379 F.Supp. 1008 (S.D. Ill. 1974) aff'd mem. 506 F.2d 1404 (7th

Cir. 1974); *Pinsker* v. *Pacific Coast Society of Orthodontists,* 12 Cal. 3d 541, 526 P.2d 253 (1974); *Higgins* v. *American Society of Clinical Pathologists,* 51 N.J. 191, 238 A.2d 665 (1968).

The case before us simply does not fit this fact pattern. Although we accept, as did the district court for summary judgment purposes, the NFCR's characterization of the Council as an organization which can significantly affect the economic viability of charitable organizations by virtue of its evaluations, the court cannot find that a positive evaluation by the CBBB is a prerequisite to a charity's economic viability in the same way as the cases noted above, and others cited by the appellant, require before the common law duty of fairness is triggered. The CBBB neither licenses, nor certifies, nor confers membership upon the charities it evaluates. It is merely a "consumer's guide" to charitable donations, albeit an influential one.

In light of the above, we believe it unlikely that the Virginia Supreme Court would recognize the Foundation's proposed extension of the common law duty of fairness, particularly considering the lack of any analogous Virginia precedent. The NFCR's remedy for unfair or unreasonable evaluations must be found, if at all, in an action for defamation.

II. CBBB's Views On "Reasonable" Spending Are A Protected Statement of Opinion

The district court ruled the following excerpt from the CBBB's August 1981 Report to be a constitutionally-protected statement of opinion:

> The National Foundation for Cancer Research (NFCR) does not meet the provision of the CBBB Standards for Charitable Solicitations which calls for spending a reasonable percentage of total income on program services, as distinct from fund raising and administration.

The Foundation challenges this ruling on the grounds that the comment is a statement of fact, not of opinion. It seems to the court that what the NFCR is ultimately challenging is the

Council's benchmark of 50 percent as the minimum percentage of total income which a charity should spend on its program services. In the court's view, that percentage which constitutes a "reasonable" percentage of total income spent on program services is merely an opinion, over which the parties disagree, and not a defamatory false statement of fact. [1] Since the Supreme Court has specifically recognized that the characterization of a person's conduct as reasonable or unreasonable is a protected statement of opinion, *Greenbelt Cooperative Publishing Association* v. *Bresler,* 398 U.S. 6 (1970), this ruling by the district court must be affirmed.

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[1] In its August 1981 Report, the Council provided the Foundation's view.

> NFCR POSITION: NFCR contends that comparisons of program expenses and total income in any given year do not fully or fairly reflect the full extent of its program expenses. It reports that there is a long "lead time" between public fund raising and cash program expenses due to the need to carefully define the work to be done and to be able to ensure that projects likely to take several years to complete will be fully funded. Thus current program expenses should, in NFCR's view, be compared to the smaller amounts of cash contributions which the organization received in prior years. When viewed in this manner, NFCR reports that its program expenses exceed 50% of contributions, and thus believes that it meets the [Council's] standards.

In a similar vein, the Foundation also challenged the Council's method for computing its percentages. The Foundation would, for instance, include certain non-cash contributions of computer time and other services by universities through which research was conducted as both income and program expenditures. The Council apparently excludes non-cash contributions in its computations of expenditures and income. Questions as to the amounts expended and the inclusion of certain non-cash items as contributions are certainly factual, but the contrary conclusions drawn from those facts present the real point of contention between the parties. Each party having determined the facts according to that party's standards, each then applies its judgment and its criteria to those facts, and forms its opinion as to the meaning of those facts. This does not alter the court's view that CBBB's standard of reasonableness is still an opinion, and not a defamatory false statement of fact.

III. NFCR Is A "Public Figure" For Defamation Purposes

The district court ruled that the NFCR was a public figure for the purposes of its defamation action against the CBBB. Accordingly, the NFCR would be held to the strict standard of proof enunciated in *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) in prosecuting its defamation action against the Council. The Foundation has appealed this ruling, contending that the district court's holding ignored controlling precedent and was erroneous as a matter of law. We affirm the district court.

The appellant asserts that the district court, in finding that it was a public figure for some purposes, misapplied the Supreme Court test enunciated in *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974) for determining "limited purpose" public figures. The NFCR would restrict the scope of the *Gertz* holding to define public figures as those who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.* at 345. The appellant then asserts that the only "controversy" is a private dispute regarding the application of the CBBB's reasonableness standard to the NFCR. Thus, there being no particular public controversy in which the appellant could have thrust itself to the forefront, there can be no correct finding that the NFCR was a public figure under *Gertz.*

We think it is the appellant who misapplies the *Gertz* test. *Gertz* recognizes that the key to determining whether a party is a public figure is the party's own conduct.

> It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

Id. at 352. On the basis of the NFCR's conduct, the district court had ample cause to rule the appellant a public figure for the purposes of the defamation action. Even though the "public controversy" which formed the basis of this lawsuit arose almost entirely from the Foundation's solicitation and use of funds for its cancer research, the mere fact that the NFCR generated the controversy does not preclude a finding that there

was, in fact, a controversy. *See Steaks Unlimited, Inc.* v. *Deaner,* 623 F.2d 264, 273-74 (3rd Cir. 1980). The evidence is uncontroverted that the Foundation had thrust itself into the public eye, not only through its massive solicitation efforts (almost 68 million pieces of direct mail solicitation in the past three years), but also through the claims and comments it made in many of these solicitations where it extolled its judicious use of donated funds in finding a cure for cancer, where it declared its objective to make "NFCR a household word," and where it asserted the need "to present [NFCR's] case to the jury of the American people." The Foundation vigorously sought the public's attention, and succeeded to a substantial degree, as is reflected by the approximately $25,000,000 it raised in the past three years and the numerous inquiries the CBBB had received from the public and the media regarding NFCR. It was these inquiries which in fact led the Council to undertake its evaluation.

The appellant would, by its reliance on such cases as *Hutchinson* v. *Proxmire,* 443 U.S. 111 (1979), portray itself as one victimized by the Council's attempt to "create" a defense by making the plaintiff a public figure, thereby erecting the *New York Times* v. *Sullivan, supra,* obstacles to recovery. However, it is clear from the record that the NFCR did not unwittingly become the subject of publicity with respect to its approach to cancer research or its use of donated funds. Quite to the contrary, it attempted, through various means at its disposal, to put itself and its methods before the public. With respect to these issues, it became a public figure under *Gertz.*

AFFIRMED.

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 81-772-A

NATIONAL FOUNDATION FOR CANCER RESEARCH, INC.,
Plaintiff,

VS

COUNCIL OF BETTER BUSINESS BUREAUS, INC.,
Defendant.

Friday, March 19, 1982
Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

ON BEHALF OF THE PLAINTIFF:
STEWART C. ECONOMOU, ESQ.
and
MAC S. DUNAWAY, ESQ.
122 South Royal Street
Alexandria, Virginia 22313

ON BEHALF OF THE DEFENDANT:
THOMAS MONCURE, ESQ.
121 South Royal Street
Alexandria, Virginia 22313

ON BEHALF OF THE DEFENDANT:
MS. DONNA M. MURASKY
OF: COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D. C.

PROCEEDINGS

THE CLERK: Civil Action No. 81-772-A, National Foundation for Cancer Research, Incorporated versus Council of Better Business Bureaus, Incorporated.

THE COURT: This comes on on the defendant's motion for summary judgment.

MR. MONCURE: Good morning, Your Honor. I'm Thomas Moncure, a member of the Bar of this Court.

I'd like to introduce to the Court Miss Donna Murasky, member of the Bars of Michigan and the District of Columbia and a member of the firm of Covington and Burling, who will present the defendant's motion for summary judgment.

THE COURT: All right. I've read your submissions, but to the extent you want to elaborate on them, fine.

MS. MURASKY: Thank you, Your Honor. I'll try to keep this brief.

The Council of Better Business Bureaus has moved for summary judgment on two issues that are remaining in this case.

The first issue is whether the Better Business Bureau published an actionable, defamatory statement about NFCR.

The second is whether The Better Business Bureau violated any common-law duty of fairness to NFCR. The answer to each question is no.

First, with respect to the defamation claim, the Better Business Bureau—the record is clear that the statements about which NFCR complains are either protected expressions of opinion or truthful statements of fact.

Second, NFCR is a public figure, so that even if the Better Business Bureau did publish false statements of fact, NFCR may not recover without showing actual malice with convincing clarity; however—.

THE COURT: (Interposing) Well—.

MS. MURASKY: (Interposing) I'm sorry?

THE COURT: When we talk about actual malice, you're talking about New York Times' malice.

MS. MURASKY: That's right, Your Honor.

THE COURT: Which is knowingly false or made with a—.

MS. MURASKY: (Interposing) Reckless disregard of truth or falsity.

THE COURT: But it isn't actual malice in the sense of evil intent?

MS. MURASKY: No, it is not, Your Honor.

With respect to the NFCR's common-law fairness claim, the law is clear that an organization such as The Better Business Bureau, in the exercise of its First Amendment rights owes no duty to NFCR beyond any imposed by state tort law.

The Better Business Bureau has reported about the practices of NFCR on several occasions. It's most recent report, dated August of 1981, took ten months to prepare. This is the report on which this litigation is based. It makes two statements that are central to the defamation claim in this litigation.

The first statement is that NFCR does not spend a reasonable percentage of its total income on its program of cancer research. The second is that NFCR made false and misleading statements in its solicitation materials. The first statement is a protected expression of opinion as was made clear by the Supreme Court in the Greenbelt Publishing Association Case.

There the Supreme Court held that no liability could be imposed on a newspaper for reporting that plaintiff's negotiating position had been characterized as blackmail. This characterization, the Court ruled, was a protected expression of opinion that some considered the plaintiff's negotiating position extremely unreasonable.

Under Greenbelt Publishing, The Better Business Bureau's opinion that NFCR spends an unreasonably low percentage of its resources on its data program services is absolutely protected.

Insofar as NFCR's defamation claim is based on allegedly false statements of fact, The Better Business Bureau is still

entitled to summary judgment. NFCR claims that summary judgment is improper because the August, 1981, report states that The Better Business Bureau regarded NFCR's 1980 fund raising appeals as inaccurate and misleading.

That determination, Your Honor, was based in part on the following NFCR claim sent to millions of prospective donors, and I quote: "You can be sure that we will make the most productive use of every dollar you send, too. Not one red cent will go for the usual scientific foundation trappings."

In its opposition, NFCR does not dispute that this claim was inaccurate and misleading, nor does it dispute the evidence underlying The Better Business Bureau's determination of inaccuracy and misleading.

This information was basically—two major points: One, NFCR's funding to the research institutions and universities at which it has its so-called laboratories without walls includes "a reasonable percentage to the university for their overhead." NFCR's own financial statements for the fiscal year at issue in this case disclose that 45 per cent of NFCR's cash contributions was spent on fund raising and administrative overhead, while only 25 per cent was spent on research.

There is, therefore, no disputed issue of fact about whether some of NFCR's solicitation materials were false and misleading.

If there are any questions about the accuracy of other factual statements in the August report, they are resolved by a rewritten PAS report drafted by NFCR in June of last year. NFCR's proposed report differs from the Better Business Bureau's August, 1981, published report in only the two respects I've already discussed.

First, the NFCR draft reports states that its program service expense of 45 per cent of total income are reasonable under BBB standards.

Second, the NRCR report, just like the opposition, in this case, does not address the question whether NFCR's "Not-one-red-cent claim" was inaccurate and misleading.

If this Court should decide that The Better Business Bureau is entitled to summary judgment on NFCR's defamation claim because the August, 1981, report contains only protected expressions of opinion and truthful statements of fact, then it need not decide whether NFCR is a public figure for purposes of commentary on claims made in its solicitation materials, including claims made about its spending practices.

If, however, this Court should not resolve that matter totally in The Better Business Bureau's favor, it should decide whether NFCR is such a public figure. Whether NFCR is a public figure is a question for the Court.

That NFCR is a public figure is made abundantly clear by two cases cited in our papers. The first is the case of Steaks Unlimited versus Deaner. In that case the defamation—.

THE COURT: (Interposing) I'm familiar with that case.

MS. MURASKY: Okay. Your Honor, the other case I would point to is the Bose Case.

Those cases essentially stand for the proposition that when someone advertises for the purpose of soliciting the consumer's dollars and does it on an extensive basis, commentary on those solicitations is naturally engendered and that the person who engenders those solicitations is a public figure.

In this case, the evidence is even more conclusive than they are on the other two cases about NFCR's position as a public figure. In the two cases I've mentioned, one plaintiff spent $16,000 on advertising. The other spent $100,000. In the fiscal year at issue in this case, NFCR spent $2.9 million dollars in its fund raising efforts. That is well more than The Better Business Bureau's philanthropic advisory service budget for that entire year, which was a quarter of a million dollars.

The $2.9 million dollars supported the distribution of, approximately, 25 million pieces of direct mail solicitations. These solicitations discuss the urgent need for funds for cancer research. These solicitations claim that the dollars received will be used to support NFCR's research in the most productive manner.

These solicitations claim that the National Institutes of Health have wasted millions of dollars in fruitless research. These solicitations emphasize the uniqueness of NFCR's research approach, its laboratory without walls. The solicitations also claim that NFCR is on the front lines of the fight against cancer and that another few months could make the difference.

In addition to its massive solicitations, it has made hundreds of attempts to secure media attention and it has secured media attention. In our trial exhibits are numerous newspaper articles and evidence of public service announcements dealing with NFCR's operations.

Here as in the Bose Case, moreover, NFCR has even reprinted some of these newspaper articles to send along with its solicitations. One of these is mentioned in our reply brief, Your Honor.

Finally, of course, there is a very close connection between NFCR and Dr. Szent-Gyorgyi, a Nobel prize figure in his own right. If there were any doubt about the matter, Your Honor, I think it is confirmed by statements made by both of the Salsburys. The one is contained in our reply which Mr. Salsbury is quoted as saying he is taking the case of NFCR to the jury of the American people.

The other is found in Mrs. Salsbury's deposition when she talks about hiring a public education director and his duties. "He gets our scientists on television and radio programs. He gets the foundation's name in magazine articles. He contacts writers. In other words, his job is to make the National Foundation for Cancer Research a household word."

For those reasons, Your Honor, I do believe that NFCR is clearly a public figure and I think as the record indicates there is no evidence of actual malice in this case as defined in the New York Times versus Sullivan sense.

Finally, NFCR claims that even if The Better Business Bureau did not defame, The Better Business Bureau nevertheless breached a common-law duty of fairness to it.

In support of this argument it relies solely on cases dealing with the obligations of membership associations to its members

or to applicants for membership. NFCR is not a member of The Better Business Bureau nor has it applied for membership.

In addition, none of the cases cited involve the exercise of free speech rights that are the heart of this case. The cases NFCR relies upon are plainly inapplicable. NFCR is really asking this Court to impose on The Better Business Bureau certain conditions before it may exercise its first amendment rights to express its opinions and to comment truthfully about NFCR's practice.

However, as the Supreme Court pointed out in Miami Herald against Tornillo, it is unfair to impose such conditions on the exercise of First Amendment rights.

Finally, Your Honor, on the question of terminus fees, we'll rest on our papers.

THE COURT: All right.

MR. ECONOMOU: Your Honor, I'd like to introduce Mac Dunaway, who will argue against the motion for summary judgment, on behalf of NFCR.

THE COURT: All right.

MR. DUNAWAY: May it please the Court, Your Honor, there are two fundamental issues before the Court, I believe, today; and that is, first, whether or not the defendant's actions in establishing standards for charitable organizations and evaluating compliance with those standards is subject to any judicial review; second, whether or not the defendant has libeled National Foundation for Cancer Research.

I would like to take them in the order in which I've identified those issues, Your Honor.

THE COURT: All right. But bear in mind that they've been thoroughly covered by your brief, reply brief and the reply to the reply and—.

MR. DUNAWAY: (Interposing) I thank you, Your Honor. Yes, sir, I will. I do realize they have and certainly appreciate the Court's reviewing those prior to the argument.

Your Honor, the Council of Better Business Bureaus is a very large, a very powerful, a very influential organization. It

has worked hard to attain that position. It's worked even harder to keep that position.

THE COURT: But it's really nothing but a consumer guide, isn't it?

MR. DUNAWAY: No, sir, Your Honor, it is not.

THE COURT: Maybe a large successful consumer guide.

MR. DUNAWAY: It is exceedingly successful.

THE COURT: Has this common-law duty of fairness ever been extended to this sort of a—. (Pause)

MR. DUNAWAY: I would like to address that specific point, Your Honor, but before addressing—.

THE COURT: (Interposing) No. You're at that point right now.

MR. DUNAWAY: Yes, sir, I am, Your Honor.

Contrary to the suggestion made by the defendant in their brief, we have not abandoned the due process argument, that have always been a part of this case—.

THE COURT: (Interposing) I don't gather that you've abandoned them but I have serious question whether this is the sort of case to extend judicial review to what in my view is little more than a consumer guide albeit a very successful type and influential—.

MR. DUNAWAY: (Interposing) A very successful, a very powerful set of publications, a very powerful, dominant influence—.

THE COURT: (Interposing) I accept all that. I expect I have to for purposes of summary judgment. I'm still not satisfied that that doctrine has ever been extended to anything except professional memberships I think cattle dealers or cattle raisers, angus cattle people and that sort of thing—.

MR. DUNAWAY: (Interposing) Those cases that we cite and rely on stand for the basic proposition. The defendant tries to distinguish those cases by saying there is some special quality

that attaches to the membership aspect of those cases, but, Your Honor, we submit there is not.

THE COURT: But do you anticipate the consequence of allowing judicial review of some procedural or substantive due process requirement to everybody who is adversely commented upon in this sort of a consumer publication?

MR. DUNAWAY: No, Your Honor, we do not suggest that. We do not suggest that at all.

THE COURT: But isn't that the consequence of your argument that everybody who is dissatisfied with the rating they get, has a right to judicial review of whether that rating or whatever, is supported by substantial evidence, whether the noticing hearing requirement, the procedural due process apply?

I just wonder if that's something the Courts have any business in.

MR. DUNAWAY: If an organization has the power to affect the economic and professional concerns of third parties and does so aggressively themselves by establishing standards and interpreting and applying those standards and it has a direct, measurable impact on those third persons and the persons who are promulgating those standards and applying those standards knows before it does so that that impact will be direct, immediate, and visible.

THE COURT: Isn't there a remedy defamation in an appropriate case? But to say that governmental due process proscriptions apply to private conduct of this sort, it seems to me an entry of the judiciary into a field left to recourse better by the defamation laws.

MR. DUNAWAY: I submit, Your Honor, that The Better Business Bureau is not called a watchdog regulatory agency for nothing. It is indeed called that because they are perceived to be such by the public, by those people that are subjected to their standards, by those people that are evaluating and rating them—.

THE COURT: (Interposing) But, in fact, they have no governmental regulation.

MR. DUNAWAY: That is correct, Your Honor. But, in fact, many of the local bureaus act as local registering bodies for the government. They serve that government function. They serve the traditional government functions of exercising regulatory not necessarily authority in the sense that authority is granted to them by a legislative body, but truly the authority to impact the economic livelihood and well being of charitable organizations they rate.

I would like to address those cases that you alluded to a little earlier and certainly those cases on which we rely. The defendant does try to distinguish those cases using the aspect of those cases, which clearly was involved and that is those involved membership cases. But each of those cases and in each of those cases the Court stressed it was not the membership, the presence of the membership relationship with the organization that mattered. Instead, it was the manner in which those organizations exercised the power that they possess.

I submit to the Court that that was not the underlying reason why the Courts in those cases exercised judicial review. That's precisely the case we have here. This is not a membership case but it is indeed a case where the same kinds of authority are exercised as were exercised in those cases and we submit to the Court that it is an appropriate case for judicial review of those.

THE COURT: All right, sir.

MR. DUNAWAY: I would note in passing, Your Honor —I certainly won't dwell on it, with respect to the issues of the nature and extent of the power exercised by The Better Business Bureau, the formulation of their standards, application of their standards, there are a great many disputed facts in the record.

I think it would be difficult for the defendant to deny that there are a tremendous number of disputed facts in the record, which would make summary judgment inappropriate.

With respect to the defamation counts, Your Honor, the defendant has conceded for purposes of this motion that the 1981 report to which was referred to earlier, is clearly capable

of a defamatory meaning. They rest their motion for summary judgment as the Court properly noted on the allegations that the plaintiff is a public figure for purposes of this case and that the actual malice standard of New York Times and Sullivan and its progeny must apply and, therefore, they're entitled to summary judgment.

But it's critical for the Court, I believe, to focus in on the fact that the defendant has failed to meet its burden with respect to the public figure argument that it advances.

THE COURT: How can this plaintiff deny it's a public figure? Here it's thrust itself into the field of cancer research and while it doesn't—cancer research doesn't fit a "controversy" in the sense of a dispute, it certainly is a cause that the plaintiff is preeminent if not dominant in by its own assertions and assuming that they should be watered down some, that nobody is as good as he says he is, that it seems to me they can't contest that they're a public figure.

Massive mailings, media attention, it seems to me they fit every criteria of a public figure.

MR. DUNAWAY: Well, I was about to go through what I believe the criteria are for—.

THE COURT: (Interposing) You have to identify the controversy.

MR. DUNAWAY: A particular public controversy but a general concern for cancer research or Soviet espionage—.

THE COURT: (Interposing) It isn't just newsworthiness. I concede that. But these people have put themselves in the forefront of cancer research.

MR. DUNAWAY: But that is not a particular controversy that the Courts have mandated that be identified.

THE COURT: I don't think to be a type of controversy that fit the Gertz and some of the other cases, it necessarily denotes a quarrel or dispute. Would you think—?

MR. DUNAWAY: (Interposing) I think we can agree on one thing, Your Honor, that the defendant is not saying and has

not said in its papers that NFCR is a public figure for all purposes.

THE COURT: No.

MR. DUNAWAY: There are limited purposes.

THE COURT: Although your own brochures describe yourselves as a household word—.

MR. DUNAWAY: I wish we were, Your Honor.

THE COURT: And I would agree that you're not a celebrity to be a public figure for all purposes, but it seems to me that you have—when I say "you," I'm talking about your client, of course—put yourself in the forefront of cancer research, to the point where its a bit ingenuous to assert that you're not a public figure.

MR. DUNAWAY: Your Honor, I believe the cases hold quite clearly that the defamation that is alleged to have taken place must be with respect to the controversy. What is the defamation that is alleged to have taken place here, that the defamation is that we are somehow illegitimate, that we do not spend a reasonable amount of money on cancer research, that defamation—those defamatory statements do not relate to the substantive field of cancer research in which this organization is not only involved but actually conducts.

THE COURT: I don't agree. It seems to me that you rely on fund raising to support your activities, and it's the fund raising that has injected you into the public eye as much as research.

MR. DUNAWAY: Well, certainly, Your Honor, my client is indeed engaged in solicitation of funds from the general public, and in order to solicit them we certainly have to communicate with them in some fashion to tell the story. There is no question about that.

THE COURT: Don't you think what you do with the money you raise is inextricably tied up with the cancer research?

MR. DUNAWAY: Is that a preexisting public controversy, or on the other hand, is that controversy something that the defendant itself has created?

I submit, Your Honor, that that is a controversy which was not public. It's a controversy which the defendant created. It's clearly not a controversy that we thrust ourselves into. That's the last controversy we want to get involved in.

THE COURT: Well, most people who end up suing for defamation would just as soon have stayed out of the controversy.

MR. DUNAWAY: Both sides, probably, Your Honor.

THE COURT: I don't know that that's determinative of it. I mean you're not like the individual who was held in contempt—what is it, the Wolston Case? I have a hard time finding your client anything but a public figure.

MR. DUNAWAY: Your Honor, I respectfully submit that the defendant has indeed failed to demonstrate what I believe and what I think the cases show as the five essential ingredients of a limited purpose public figure and that failure should be adequate to defeat their motion for summary judgment.

Even if the Court should find that NFCR is a limited purpose public figure for the purposes of this case, there remain genuine issues —.

THE COURT: (Interposing) I'm not satisfied that that disposes of the matter entirely. But I —.

MR. DUNAWAY: (Interposing) Yes, sir.

THE COURT: That is an element.

MR. DUNAWAY: Yes, Your Honor. It is indeed a matter for the Court to determine whether an individual involved in a defamation case is a public figure. I have no quarrel with that. I just believe that the criteria have not been satisfied in this case.

I would like to address another point with respect to the defamation cause that the defendant has pressed. That is, whether or not the statements involved here are expressions of opinion or whether they're assertions of fact.

THE COURT: Wouldn't you say that it's a close question whether or not that the statement the plaintiff does not spend a

reasonable amount or reasonable percentage of its total income or total collections on the program, would that be close to an opinion? Would you agree?

MR. DUNAWAY: It may be, Your Honor, in other circumstances. I do not believe it is in the context of this case. I believe they're clearly disputed issues in this case. As the record now stands, we have a situation where the statements were made as assertions of fact.

The documents on which it was made indeed indicate that it was made as an assertion of fact. The percentage limitations that are applied by the Council of Better Business Bureaus in evaluating compliance with the standard are clearly delineated. There are 50 percent on one hand, program services, and 35 percent on the other hand for fund raising expenses.

Those are clearly capable of being shown to be true or false in the context of the cases as presented to the Court now. I believe that those are indeed assertions of fact and they're capable of being proved true or false which is the test as to whether or not a statement in a defamation action is an expression of an opinion or an assertion of fact.

There are a wealth of disputed facts which we had hoped to convince the Court of and they are indeed in the papers. I will not dwell on them further. I think the existence of those disputed facts makes summary judgment inappropriate in this case both as to the defamation count as well as to the other count.

THE COURT: All right, sir.

MR. DUNAWAY: Thank you, Your Honor.

MS. MURASKY: Your Honor, unless you have some questions, I will rest my case.

THE COURT: Well, I do have some questions. I'm concerned whether particularly insofar as the statement that the—about inaccurate and misleading is concerned. I'm not so sure that from this record depending on the inferences the fact-finder might draw from the various figures and reasons for those figures that have been presented in the opposing papers

that I can say as a matter of law or say that the record is conclusive, that there is no issue of fact as to whether those figures are inaccurate or misleading.

If your view of what those figures reveal—I get a contrary view of the inferences to be drawn from those figures from the plaintiff. And the fact that you take a different view of it is not unexpected but I have a hard time finding out just with any degree of certainty what is the proper inference to be drawn from those figures.

MS. MURASKY: I think, if I understand this case properly, Your Honor, the percentages themselves that are contained in the report are not disputed at all. They are accurate percentages, and I would direct the Court's attention to the draft report that was prepared by NFCR.

Insofar as the 50-per cent figure is concerned for program services, there is no dispute in this case that NFCR in the fiscal year at issue spent less than 50 per cent of its total income on program. It spent 45 per cent. There is no dispute.

The Better Business Bureau thinks that is unreasonably low. The NFCR thinks that it's a reasonable figure to spend in light of all the circumstances.

THE COURT: There's one thing to say it's unreasonably low, it seems to me another thing to say that it's inaccurate and misleading.

MS. MURASKY: The inaccurate and misleading claim, Your Honor, goes to statements contained in NFCR's solicitation materials. And we discussed these in our memorandum. It has to do with the "Not-one-red-cent" claim is—"Not one red cent is spent on the usual scientific foundation trappings." NFCR did drop that from its solicitation material. And in NFCR's opposition, Your Honor, they have not disputed either that the "Not-one-red-cent" claim was false. There's no dispute on that point.

There is nothing in their papers that discussed that point. Nor did they dispute any of the underlying figures that persuaded The Better Business Bureau to conclude that the

"Not-one-red-cent" claim was false. I think Mr. Dunaway could confirm that they do not dispute that particular support for the finding that the false and misleading, for the finding that NFCR's solicitation materials—.

THE COURT: (Interposing) Is that the only thing to which the inaccurate and misleading refers?

MS. MURASKY: No, it's not, Your Honor. The only other thing that's mentioned in our memorandum is that NFCR's solicitation materials has a P.S. in its sweepstakes. It gives away cars and other such items. And they have a P.S. that says, "Not one red cent of NFCR's money is spent on prizes. These prizes are donated by some concerned donor."

In fact, the financial statements that are at issue in this case indicate that there could not have been any such money, that the prizes were, in fact, not given by donors but they were prizes that were purchased by NFCR. That's the other claim that The Better Business Bureau found false and misleading.

Once again the opposition in this case does not address the question whether the prize, the representation about the prize money was false and misleading, doesn't address it at all. It's undisputed as I understand it. What NFCR does do in its papers, in its opposition here is to take a draft solicitation that was prepared by the General Council about two weeks before this lawsuit was filed, when it was sent to The Better Business Bureau and it takes Nancy DeMarco's statement in reviewing that solicitation, it takes a little statement out, well this solicitation is technically accurate and yes, Miss DeMarco said that that draft solicitation sent by the General Counsel to her was technically accurate insofar as it treated or expressed to the public what NFCR did with its reserves.

However, even that draft solicitation was as Mr. Hopkins of General Counsel, admitted in his deposition, false and misleading because it stated that NFCR spent 28 percent of its total income on postage instead of postage and fund raising. Your Honor, I think for those reasons there truly is no disputed issue of fact about The Better Business Bureau's determination that NFCR had false and misleading claims in its solicitations.

MR. DUNAWAY: Your Honor, could I be heard on that?

THE COURT: Just on that last item of inaccurate and misleading.

MR. DUNAWAY: Yes, Your Honor. As the Court I'm sure knows, the "Not-one-red-cent" quotation is not a part of the 1981 report, which is the subject of the litigation. Notwithstanding that, the Council of Better Business Bureaus' standards contain a specific provision with respect to solicitation materials being truthful and accurate or otherwise not false or misleading.

The 1981 report does not, does not, conclude that the National Foundation for Cancer Research violates that standard. It does not conclude that. It only concludes that another portion of the standard is violated. The fact that they put this suspicion in the report itself is, we contend, defamatory.

One other point, Your Honor, on the false and misleading aspect has to do with the Council for Better Business Bureaus' presumption that they are qualified to render some judgment on the substance of the scientific research being done by National Foundation for Cancer Research. They clearly are not. They admitted they are not. Yet the 1981 report contains a ridiculous statement that they have reviewed summaries of the research and have reach some conclusion with respect to that when they know and they admit they have no expertise in that field. I thank you, Your Honor.

THE COURT: Treating that part of your amended complaint which deals with the common-law duty of fairness first, this is a diversity case, and I would have to try to anticipate what Virginia would do in an asserted claim for common-law violation or common-law duty of fairness.

There to my knowledge is no Virginia case. But I don't believe Virginia would take the opportunity afforded by this case to adopt or what I believe would be an enlargement of the cases, the theory of the cases that have adopted a theory of judicial review on fairness grounds that was initiated in California and to some extent has been followed by subsequent courts.

That theory of liability imparts to private organizations which extert such an influence as to have an economic impact

on them, members of organizations, certifications for the right to practice professions. Due process, both substantive and procedural, proscriptions normally thought to only be required of governmental entities.

The defendant here in my view is nothing more than a consumer guide of sorts, albeit a large one, an influential one, a powerful one, and I accept that for the purposes of this motion certainly. But the cases that have invoked this doctrine have never gone so far as to do it for an organization of this type—I mean an organization such as the plaintiff and a defendant of this type.

The consequences of it are large. This would involve judicial review of every organization which is dissatisfied with the rating or evaluation or statement concerning whether those other of a charitable organization involve an inquiry as to whether they were given notice of the rating or comment, an opportunity to be heard, a review of it, whether their standards were reasonable.

It seems to me that that injects the judiciary in something it has no business in. It's already in lots of things that it probably has no business, but this is one that it seems to me that it has the option to stay out of, and I'm taking that option. I don't think this is an appropriate case for that judicial participation in what is basically a private matter, unaffected by any governmental regulation.

And so on that basis, summary judgment will be awarded the defendant on the claim asserted under the theory of a common-law duty of fairness of judicial review.

Insofar as the defamation claim is concerned, I have no problem determining that this plaintiff is a public figure. In the words of Gertz, it has assumed a role of special importance in this affair of society, namely, cancer research. And while it is not a public figure for all purposes, it has, it seems to me, thrust itself in the forefront of a particular public controversy in order to influence the resolution of issues involved.

I don't take controversy as always meaning dispute or quarrel. I think it can be a cause. Certainly, the cause of cancer

research and the funding that is involved in pursuing that research is a public cause. Controversy, if you will, if you go further and talk about the methods of research that this particular organization pursued.

I don't think you have to get that far. They are—they have by massive mailings, by media attention, it seems to me, created with their research and their funding themselves as public figures. They undertake to influence the consuming public. It certainly has received, both research and funding by them, has received public attention.

It's more than just newsworthy. They have thrust themselves into the forefront of a matter that has public interest. So I will rule on the defamation count that the plaintiff is a public figure.

I further rule on the defamation count that the statement that the plaintiff does not spend a reasonable percentage of its total income in program-related activities is an expression of opinion, which in view of the fact that the basis of that is revealed, it is an opinion not subject to a suit for defamation.

I cannot say that about the statement with regard to the inaccuracy and misleading character of the solicitation material. That it seems to me even under the New York Times malice standard, remains an issue in dispute, factual issue in dispute, particularly in view of the protracted meetings that apparently preceded some of these reports.

Whether this was false and if so whether it was knowingly false or statement made with a reckless disregard of whether it was false or not, I cannot say as a matter of law is not a finding that an ultimate fact-finder will make.

So, I'll deny the motion for summary judgment insofar as the complaint seeks to recover for libel involving the statement concerning inaccuracy and misleading nature of the solicitation material.

I will grant summary judgment insofar as the complaint undertakes to assert a claim for libel arising out of the statement that the plaintiff does not spend a reasonable percentage of its total income in program-related activities.

And I will sustain or grant rather the motion for summary judgment insofar as it seeks to have dismissed the claim for violation of the common-law duty of fairness. I'll prepare the order.

(Whereupon, the motion proceedings in the above-captioned matter were concluded.)

APPENDIX C

ORDER

Upon consideration of the defendant's motion for summary judgment, and for the reasons stated from the bench, it appearing that as to Count I of the Amended Complaint, the circumstances shown by this record do not entitle the plaintiff to judicial review, on the theory of unfairness resulting in economic injury, to determine whether procedural or substantive due process requirements have been met; that the statement of the defendant that the plaintiff did not spend a reasonable percentage of its total income on program services is a statement of opinion not actionable under Count V of the Amended Complaint; that for purposes of Count V of the Amended Complaint the plaintiff is a public figure; that there remain genuine issues under Count V of the Amended Complaint whether (i) a statement regarding the inaccurate and misleading nature of plaintiff's promotional material was false, and, if so, (ii) whether it was knowingly false or made with a reckless disregard of whether it was true or false; and that there should be no award of attorneys' fees to counsel for defendant, it is hereby ORDERED that:

1. As to Count I of the Amended Complaint, the defendant's motion for summary judgment is granted, and that count is dismissed.

2. As to Count V of the Amended Complaint, the court finds that the plaintiff is a public figure, and that the statement referred to above as an opinion is not actionable. To this extent the defendant's motion for summary judgment is granted. It is otherwise denied as to Count V of the Amended Complaint.

3. Defendant's request for attorneys' fees is denied.

/s/ ALBERT V. BRYAN, JR.
United States District Judge

Alexandria, Virginia
March 19th, 1982